United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 23, 1996

TO : Richard L. Ahearn, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Teamsters Local 284
(Complete General Construction Co.)
Cases 9-CC-1581, 9-CE-62

560-2575-6713
578-6031
578-6070
584-3740-1700
584-5056

These cases were submitted for advice regarding whether: (1) the transportation of dirt via dump trucks between two jobsites 9 miles apart controlled by the same general contractor constitutes on-site work within the meaning of the proviso in Section 8(e), and (2) whether a grievance to enforce an "area standards" subcontracting clause violates 8(e) when the union's course of conduct indicates that its motive was to force the owner-operators to whom the work was subcontracted to join the Union.

FACTS

Complete General Construction Co. ("Employer") is a general contractor engaged in highway and heavy construction. The Employer is a "me-too" signatory to the 1995-98 Ohio Highway-Heavy State Agreement between the Ohio Contractors Association and the Ohio Conference of Teamsters ("Union Contract").[1]

Busch Properties contracted with the Employer to construct man-made lakes on land adjacent to property owned by Anheuser-Busch ("Busch Jobsite"). This work required

[1] The Ohio Conference of Teamsters is hereinafter referred to as the "Union."

the excavation and removal of large amounts of dirt from the Busch Jobsite. The Employer initially hired 4 operating engineers, 2 laborers, and 26 Union dump truck drivers to perform the work. The operating engineers operated the bulldozer and excavation equipment, removing the dirt from the ground and placing it in dump trucks. The Union dump truck drivers transported the dirt removed from the Busch Jobsite to a highway construction jobsite 9 miles away which was also controlled by the Employer ("Highway Site"), where the dirt was utilized in highway construction. The Union drivers drove "belly" dump trucks provided by the Employer, and were paid approximately $17 per hour plus benefits.

In early August, 1996[2] the Employer contracted with South Bloomingville Enterprises Inc. d/b/a S.B.E. Trucking ("S.B.E."), a non-union company. S.B.E. agreed to supply the Employer with owner-operators of "tandem" dump trucks to transport dirt from the Busch Jobsite to the Highway Site.[3] S.B.E. paid its drivers $34 per hour for the dump truck and the transportation of dirt combined. There is no evidence that any of the S.B.E. owner-operators subcontracted the driving of their dump trucks or employed other workers to drive their dump trucks.[4]

As of August 8, approximately 20 S.B.E. drivers worked alongside the Union drivers. The Region determined that the S.B.E. drivers and the Union drivers performed the same work: transporting dirt from the Busch Jobsite to the Highway Site. The Union and S.B.E. drivers made an average of 16 or 17 consecutive round-trips between the Busch Jobsite and the Highway Site during a 10 hour shift. They

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[2] All dates refer to 1996 unless otherwise noted.

[3] The Employer claimed that it required "tandem" dump trucks, which it did not own, because "belly" dump trucks were not able to safely unload at certain elevations of the Highway Site. "Tandem" dump trucks unload their contents by lifting up their beds, while "belly" dump trucks empty through the doors of the "belly" of the dump truck.

[4] The Region concluded that the S.B.E. drivers were independent contractors.

spent approximately 10 minutes loading dirt at the Busch Jobsite, during which time the drivers normally remained in their trucks. On average, they spent 5-10 minutes unloading their dirt at the Highway Site, and 20 minutes driving on public roads round-trip. Neither the Union drivers nor the S.B.E. drivers hauled any dirt or other materials within the Busch Jobsite, and they did not perform any excavation work.

Early on August 8, when the S.B.E. drivers reported for work, several Union representatives visited the Busch Jobsite in response to the Union steward's report that dirt was being transported by non-union drivers. The Union representatives told two S.B.E. drivers that they could not work at the Busch Jobsite because they were not Union members. The Union claims that it asked several S.B.E. drivers what they were paid, and were told $9-10 per hour. After the Union representatives spoke to the drivers, 17 of the 20 S.B.E. drivers scheduled to work for the Employer left the Busch Jobsite without working. Union representatives also told the Employer's supervisors at the Busch Jobsite that the S.B.E. drivers couldn't haul dirt at the Busch Jobsite because they weren't Union members and they were paid substandard wages, and that the Union was going to stop the S.B.E. drivers from hauling dirt at the Busch Jobsite until they paid Union dues. The Union representatives also informed an officer of the Employer that it had violated the Union Contract by hiring drivers who were not Union members, and by not scheduling a pre-subcontracting conference with the Union. The Employer responded that the proper procedure for a breach of the Union Contract was to file a grievance.

The next day, August 9, the Union picketed the Busch Jobsite for approximately 2 hours. The Union's picket signs read as follows:

NOTICE TO THE PUBLIC

Complete General's Subcontractors
pays its employees doing Teamsters
work substandard wages and benefits!

IBT LOCAL 284

No dispute with any other employer.

That same day, the Union presented the Employer with a grievance relating to the S.B.E. drivers, citing breaches of two provisions of the Union Contract. The first alleged breach relates to Article X, Section 43, which requires the Employer to notify the Union of all subcontracts of $300,000 and over, and allows the Union to request a pre-job conference before work commences. The second alleged breach relates to the second paragraph of Article VII, Section 37, which provides as follows:

> All such work assignable to employees covered under the scope of this Agreement not to be performed at the job site shall be subcontracted only to an employer who observes the wages, and benefits of overall labor cost established herein. No such work shall be subcontracted on terms that fail to require subsequent employers to adhere to these conditions.

The Union Contract provides that these subjects may be grieved and, if not resolved, the final step of the grievance process is arbitration by the Joint State Committee.[5] The Union Contract also provides that the Union may strike if the Employer fails to abide by an arbitration decision.[6]

On August 19, the Union sent a letter to the Region indicating that it was not picketing the Busch Jobsite, and that it would not picket, to force owner-operators to join the Union, or otherwise violate Section 8(b)(4) in the future.

The Employer is no longer employing Union or S.B.E. drivers to do the dirt removal work, and has no intention of doing so in the future, as the dirt removal and hauling

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[5] Articles VIII and IX, Sections 38-42.

[6] "If any employer fails to abide by a majority decision of the Ohio Joint Committee, the Local Union, after giving the employer a seventy-two (72) hour written notice, may strike to enforce this Article." Article XI, Section 40(e), second paragraph.

phase of the Busch Jobsite project is complete.[7] However, the Employer continues to employ drivers to transport dirt removed from other Employer projects to the Highway Site.

The Union's grievance proceeded to the third step on October 7. To date, arbitration has not been requested. The Union states that it is awaiting this Advice decision prior to deciding whether to request arbitration.

ACTION

We conclude that, absent settlement, complaint should issue alleging that the Union violated Section 8(b)(4)(ii)(A) and (B) by filing a grievance against the Employer for breaching the "area standards" subcontracting clause because the work involved is not on-site construction work protected by Section 8(e). The grievance was part of the Union's course of conduct to force the Employer to interpret the "area standards" subcontracting clause as prohibiting subcontracting of the transportation of dirt between two jobsites to the S.B.E. drivers because the independent contractors S.B.E. supplied the Employer are not Union members.[8]

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[7] According to the Employer, Union drivers performed 95% of the transportation of dirt, while the S.B.E. drivers transported 5% of the dirt.

[8] The Region decided to issue complaint alleging that the Union violated Section 8(b)(4)(i)(ii)(A) by its statements to the Employer and the S.B.E. drivers that the S.B.E. drivers could not perform the hauling of dirt between the Employer's two jobsites unless they became Union members and by the Union's August 9 picketing to force or require the S.B.E. drivers, independent contractors, to become Union members. The Region also decided to allege in the complaint that the Union's picketing violated Section 8(b)(4)(i)(ii)(B). The Region is not submitting these issues to Advice.

We note that the matter here is distinguishable from cases where the primary labor dispute was between the independent contractors and the employer. See, e.g., Teamsters, Local 70 (Military Traffic Mgmt. Command), 288 NLRB 1224 (1988); Teamsters, Local 70 (Chipman Freight

However, the Section 8(e) charge should be dismissed, absent withdrawal, because the Union's grievance constituted unilateral conduct, not an agreement required to establish a Section 8(e) violation.

A. Transportation of Dirt from the Busch Jobsite to the Highway Site Was Not On-Site Work Exempt from 8(e) Pursuant to the Proviso

The construction industry proviso to Section 8(e) privileges union-employer "hot cargo" agreements which relate to "the contracting or subcontracting of work to be done at the site of the construction. . . ."

The Board explained the purpose and scope of the Section 8(e) proviso in Joint Council of Teamsters, No. 42 (California Dump Truck Owners Ass'n).[9] In Joint Council, the collective bargaining agreement required the contracting employer to terminate the employment of owner-operators it employed who failed to become union members, and defined on-site work as the hauling of materials up to 10 miles away.[10] The union contended that, based on the contract, owner-operator dump truck drivers who hauled dirt and other material from the employer's construction site to a variety of other employer-controlled construction projects up to 10 miles away must join the union. The dump truck drivers ordinarily remained in their vehicles and did not converse with any employees on the site.[11] Assuming a 10-mile round-trip, the Board calculated that a dump truck driver would spend approximately 10 minutes loading and off-loading, and 50 minutes traveling off-site. The Board held that the Section 8(e) proviso did not apply to the

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Serv.), 283 NLRB 343 (1987), enf'd, 843 F.2d 1224 (9th Cir.), cert. denied, 488 U.S. 848 (1988); Production Workers, Local 707 (Checker Taxi Co.), 283 NLRB 340 (1987).

[9] 248 NLRB 808 (1980), enf'd, 702 F.2d 168 (9th Cir. 1981), cert. denied, 459 U.S. 1193 (1983).

[10] 248 NLRB at 809-11.

[11] Id. at 812.

dump truck drivers, even though "the transportation activity [took] place between and involve[d] brief work on two sites controlled by the same construction contractor."[12] It noted that "[t]he primary purpose of the construction industry proviso - to avoid tensions among groups of employees at the same site - has little relevance to persons having such incidental contact with the site."[13] Continuing, the Board wrote as follows:

> The legislative history of the proviso demonstrates that Congress shared this conclusion by expressing its specific intent to exempt from the proviso the total process of transporting materials in spite of the fact that some tasks in that process might take place on a construction site. Consistent with this intent, the Board has repeatedly held that the proviso does not apply to jobsite deliveries (or, by logical inference, pickups) which are only a small part of basically off-site transportation activity.[14]

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[12] Id. at 815-16. See also Associated General Contractors of California, Inc., 280 NLRB 698, 701 n.9 (1986) (union did not contend that the construction industry proviso of Section 8(e) applied to owner-operator dump truck drivers who hauled dirt between two construction sites, some of which were controlled by the same contractor).

[13] Id. at 816.

[14] Id. at 816. In so holding, the Board left open the question whether on-site construction work may include some off-site work, as performed by the dump truck drivers.

> We leave open the question whether, if ever, the definition of job-site work under the proviso may include the brief and incidental transportation of materials between two proximate, but not physically contiguous geographical, sites of construction, each of which is exclusively controlled by the same contractor.

Id. at 817 n.33.

In reaching this conclusion in Joint Council, the Board expressly relied on several earlier decisions which focused on the purpose of the work performed and its relationship to the jobsite. For example, the Board cited Teamsters, Local 631 (Reynolds Elec. and Eng'g Co.).[15] which held that drivers who exclusively delivered drilling equipment to a construction site did not perform on-site construction work in the meaning of Section 8(e) where they performed no construction work and possessed no skills to perform such work. Instead, it was concluded that their limited "onsite tasks were but an inseparable extension of the total delivery process."[16]

By contrast, the proviso of Section 8(e) will apply where the driver's work consists of more than the transportation of materials and supplies. In Cahill Trucking Co.,[17] for example, drivers who delivered pipe bedding material to the jobsite and hauled away waste materials also performed backfilling on the construction site, as well as "whatever else [the contractor] needed [them] for." The ALJ concluded that the on-site construction activities were not de minimis, as the drivers sometimes spent entire days performing such work. Consequently, the construction industry proviso of Section 8(e) was held to be applicable.[18]

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[15] 154 NLRB 67, 95-96 (1965), cited in Joint Council, 248 NLRB at 816 n.3.

[16] Id. See also Teamsters, Local 294 (Clemence D. Stanton d/b/a/ Rexford Sand and Gravel Co.), 195 NLRB 378, 381-82 (1972) (delivery of sand to jobsite held to be off-site work although some part of the delivery took place on the jobsite); Teamsters, Local 294 (Island Dock Lumber, Inc.), 145 NLRB 484, 491 (1963) (cement mixing on jobsite constituted the final act of delivery of the materials, which is not exempt from Section 8(e)), enf'd, 342 F.2d 18 (2d Cir. 1965). These cases were cited by the Board in Joint Council, 248 NLRB at 815 nn.24, 27.

[17] 277 NLRB 1286, 1289-90 (1985).

[18] Id. at 1290. See also Operating Engineers, Local 12 (Stief Co. West), 314 NLRB 874, 877 (1994) (Section 8(e) proviso applicable to drivers whose "principal task" was to operate the boom truck on the jobsite, involving the

The disputed work here is nearly identical to that performed in Joint Council. The dump truck drivers' exclusive task was to transport dirt away from the Busch Jobsite to another jobsite controlled by the Employer. Since their only activity on the jobsite was to await the loading and unloading of dirt, during which time they ordinarily did not even leave their trucks, there can be no argument that their transportation duties were de minimis, as in Cahill Trucking and Stief Co. Although the Union calculates that the dump truck drivers might spend up to four hours (or 40%) of their day at the two jobsites, this does not alter the conclusion that the drivers had only the merest incidental contact with the jobsites and the construction work being performed there. As in Reynolds Elec., the only contact that the dump truck drivers had with the jobsites was during loading and unloading, which was but the beginning and end of the transportation process. Thus, the on-site construction industry proviso of Section 8(e) is not applicable to the driving work involved in these cases.

B. The Union Violates 8(b)(4)(ii)(B) When it Grieves a Lawful Subcontracting Clause for an Unlawful Purpose

1. The Subcontracting Clause is Facially Lawful

In National Woodwork,[19] the Supreme Court upheld the Board's conclusion that a union had not violated Section 8(b)(4) when its members refused to install non-union pre-fabricated doors because it was attempting to preserve work traditionally performed by the jobsite union members, which primarily benefits the employees of the primary employer. According to the Court, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees."[20]

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hoisting, lowering, placement, and removal of steel forms integral to the construction of barrier walls).

[19] 386 U.S. at 645.

[20] Id.

The subcontracting clause contained in the Union Contract prohibits the Employer from subcontracting to an employer that does not pay the same wage and benefit package established in the Union Contract. The Board has held that so-called "area standards" clauses such as this, which seek to "limit subcontracting of unit work to employers that maintain the same employment standards as those enjoyed by unit members, are lawful" because the union "has a legitimate primary interest in preserving unit work for unit employees and in ensuring that negotiated employment standards will not be undermined or circumvented. . . ."[21]
Since an "area standards" subcontracting clause is primary and lawful under Section 8(e), it may be lawfully enforced by resort to economic self-help.[22]

2. The Union's Grievance is Part of Its Unlawful Secondary Activity

Even though a subcontracting clause may be lawful on its face because it represents primary activity, Section 8(b)(4) is violated when a union attempts to enforce such a clause for an unlawful secondary purpose.

In a recent decision, Sheet Metal Workers, Local 27 (AeroSonics, Inc.),[23] the Board stated that a union violates Section 8(b)(4) of the Act when it acts unilaterally, such as by filing a grievance that is "driven by its unlawful interpretation of a facially valid subcontracting clause . . . ." The union members in AeroSonics refused to install or allow the employer to install non-union sound equipment. The union then filed a grievance based on the "area standards" subcontracting clause in the contract. The ALJ found that the union's real purpose in filing the grievance

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[21] California Dump Truck, 280 NLRB at 701.

[22] Teamsters, Local 982 (J. K. Barker Trucking Co.), 181 NLRB 515, 521 (1970), enf'd, 450 F.2d 1322 (D.C. Cir. 1971); Orange Belt District Council of Painters, No. 48 (Calhoun Drywall Co.), 153 NLRB 1196, 1199 (1965), enf'd, 365 F.2d 540 (D.C. Cir. 1966).

[23] 321 NLRB No. 79 (1996), slip op. at 1, n.3.

and lawsuit to enforce the arbitration award was to cause the neutral employer to cease doing business with the non-union sound equipment manufacturers, as the union was "anxious to organize" the sound equipment manufacturer's employees and the union warned the employer that it could not receive or install the non-union sound equipment and that there could be a picket line.[24] Moreover, the union never even introduced evidence at the grievance proceeding demonstrating that the wages paid by the sound equipment subcontractor were not "area standards."[25] The Board noted that the union could not contend it was reclaiming unit work, as there was no evidence that unit employees had ever performed the work.[26]

In Truck Drivers, Local 705 (Emery Air Freight Corp.),[27] the union threatened to strike the employer and "shut down" its facilities if it employed delivery persons not represented by the union. The union also picketed the employer's facilities and then filed a grievance claiming that the subcontractor's employees did not receive "area standards" compensation. The Board held that "in the context of the [union's] threats and strike against [the employer] which . . . had an unlawful secondary objective, the [union's] filing of the grievance was but a further attempt [of the union] to force [the employer] to cease doing business" with the subcontractor, and therefore violated Section 8(b)(4)(ii)(B).[28] Moreover, the Board noted that the union could not have had a lawful work

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[24] Id., slip op. at 7-8.

[25] Id., slip op. at 7.

[26] Id., slip op. at 1. There, the Board held that the Union violated Section 8(e) because its unilateral act of pursuing a grievance for an unlawful purpose resulted in an arbitration award, upholding the union's unlawful position.

[27] 278 NLRB 1303, 1304 (1986), aff'd in part and remanded in part, 820 F.2d 448 (D.C. Cir. 1987).

[28] Id. at 1305. The Board also noted that the Supreme Court's decision in Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 737 n.5 (1983), is inapplicable to grievances and lawsuits that have illegal objectives.

preservation motive, as the disputed work was never performed by a signatory employer.[29]

Likewise, in Sheet Metal Workers, Local 223 (Cambridge Filter Corp.), 196 NLRB 55, 56 (1972), a union that was asked to install non-union products picketed the employer, and threatened to stop work and to file a grievance alleging breach of an "area standards" subcontracting clause unless it received a sum which represented the additional cost for union members to fabricate the products. The Board held that the union violated Section 8(b)(4)(B), concluding that the union's "course of conduct constituted economic coercion applied by [the union] in pursuance of secondary objectives, namely the labor relations of the manufacturers or distributors" of the non-union products. The Board noted that the actual filing of the grievances would have been unlawful, as the grievances "were themselves intended to further [the union's] boycott of nonunion label goods."[30]

The Region concluded that the Union's statements to the S.B.E. drivers and the Union's picketing of the Busch Jobsite violated Section 8(b)(4)(i)(ii)(A) and (B) because the real purpose behind the Union's conduct was to compel the S.B.E. drivers to join the Union and not to protect "area standards." It follows, then, that the Union's subsequent filing of a grievance based on the "area standards" subcontracting clause was also intended to further its secondary objective of organizing the S.B.E. drivers. As in Emery and Cambridge Filter, the Union's grievance filing was but part of its course of action of secondary activity.

Nor can the Union's grievance be deemed primary activity as "work preservation." Although the Region

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[29] Id. at 1304.

[30] Id. at 56. See also Local 32B-32J, Service Employees (Nevins Realty Corp.), 313 NLRB 392, 392 (1993) (union's resort to arbitration over subcontracting to new company that did not hire employees or maintain wages of predecessor did not have a lawful work preservation purpose and therefore violated Section 8(b)(4)).

concluded that the S.B.E. drivers were performing the same work as the Union drivers, the Board will find a union's conduct unlawful when its true motive is secondary, rather than to preserve unit work.

For example, in Teamsters, Local 610 (Kutis Funeral Home, Inc.)[31] the Board held that the union violated Sections 8(b)(4) (A) and 8(e) by grieving and attempting to enforce an arbitration award compelling the signatory funeral homes to loan each other vehicles and drivers before using unrepresented drivers employed by nonsignatory funeral homes. The Board rejected the union's work preservation defense, finding that this "trading" scheme protected union driver jobs generally rather than jobs in each funeral home unit, and that the "trading" scheme forced signatory funeral homes to cease doing business with nonsignatory funeral homes.[32]

Likewise, in a case with facts quite similar to the facts of this case, in Teamsters, Local 282 (Active Fire Sprinkler Corp.)[33] the Board affirmed an ALJ's determination that the true purpose of a jobsite picket and strike by the union which represented the general contractor's truck drivers was to enable it to represent the plumbing subcontractor's truck drivers, and, in the alternative, to compel the general contractor to cease doing business with the plumbing subcontractor, and not for work preservation.

C. The Union did not Violate Section 8(e) by Filing its "Area Standards" Grievance

Although the filing of a grievance by the Union for an unlawful purpose but under a facially lawful contract clause violates Section 8(b)(4), it does not also violate Section 8(e). In AeroSonics,[34] the Board recently noted in dictum that "as a matter of law, solely unilateral conduct

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[31] 309 NLRB 1204, 1205-06 (1992).

[32] Id.

[33] 236 NLRB 1078, 1079-80 (1978).

[34] 321 NLRB No. 79, slip op. at 1 n.3.

by a union, for example, a threat of picketing or the mere filing of a grievance, to enforce an unlawful interpretation of a facially lawful contract clause does not violate Section 8(e) because such conduct does not constitute an "agreement." The Board has interpreted the phrase "to enter into" in Section 8(e) to "encompass the concepts of reaffirmation, maintenance or enforcement of any agreement which is within the scope of Section 8(e)."[35] Since the subcontracting clause is lawful and no arbitration award has been issued upholding the Union's grievance, there has been no "agreement" in the meaning of Section 8(e), and consequently there has been no violation of that provision of the Act.[36]

CONCLUSION

For the foregoing reasons, we conclude that, absent settlement, complaint should issue alleging that the Union violated Section 8(b)(4)(ii)(A) and (B) by filing a grievance against the Employer for breaching the "area standards" subcontracting clause because the work involved is not on-site construction work protected by Section 8(e) and because, as found by the Region, the Union's real intent in filing the grievance was to force the S.B.E. drivers to join the Union. The Section 8(e) charge should be dismissed, absent withdrawal, because the Union's grievance constituted unilateral conduct to enforce a lawful area standards clause in an unlawful manner, not an agreement required to establish a Section 8(e) violation.

B.J.K.

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[35] See Electrical Workers, Local 46 (Puget Sound Chapter, NECA), 303 NLRB 48, 62 (1991).

[36] Compare Aero Sonics, supra (violation found); Kutis Funeral Home supra (same), where Board found 8(e) violation because union obtained grievance award.